NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA
Fairfax County Courthouse
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October 11, 2017

LETTER OPINION

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Re: Porter v Porter, Case No. CL-2017-6780

Dear Counsel:

Before the Court is the Defendant's Motion for Declaration of Marriage Status. The motion presents two legal issues. First, is a marriage void where the parties obtained a valid Virginia marriage license and subsequently held a marriage ceremony conducted by a Virginia-licensed marriage celebrant, but the ceremony took place outside the geographic confines of the Commonwealth? Second, do the facts support a finding that the parties entered into a common law marriage in the foreign jurisdiction? The Defendant's position is that no valid marriage was formed either through the Virginia license or through a common law marriage in the District of Columbia. Plaintiff's position is that if the Court finds no valid marriage was created through the Virginia license, a common law marriage was still formed under District of Columbia law.

With regard to the first question presented in Defendant's Motion, the Court holds that the ceremony contemplated by Virginia's statutes must take place within the Commonwealth and that a ceremony that takes place outside the Commonwealth – even if performed by a Virginia-licensed

celebrant – has no legal effect in terms of creating a valid Virginia marriage. Second, the facts do not support a finding that the parties entered into a valid common law marriage under the laws of the foreign jurisdiction.

FACTS

The facts pertinent to the resolution of the matter are not in dispute, and are set forth in a Joint Stipulation. The Court quotes from, and adopts as established facts, the following statements from the Joint Stipulation in Plaintiff's Exhibit 1:

1. The parties scheduled a wedding ceremony for February 25, 2006, in Washington, D.C. (hereinafter as "D.C.");
2. Neither party obtained a marriage license from D.C.;
3. The parties obtained a marriage license from Virginia, but no ceremony was conducted in Virginia;
4. The officiant indicated on the marriage license that a ceremony was conducted in Arlington, Virginia, on February 25, 2006;
5. No such ceremony took place;
6. On February 25, 2006, the parties participated in a wedding ceremony at the New York Avenue Presbyterian Church, located in D.C.;
7. The officiant indicated he was licensed by the Circuit Court of the City of Alexandria, Virginia, to perform marriages in Virginia;
8. At the time of the ceremony, Ms. Porter lived in Virginia, and she has never lived in D.C.;
9. At the time of the ceremony, Mr. Porter lived in D.C.;
10. Approximately thirty to forty friends and relatives of the parties attended the wedding ceremony;
11. During the ceremony, the parties exchanged vows of marriage, thereby stating their intention to be married to each other;
12. At the conclusion of the ceremony, the parties were introduced to those in attendance as Mr. and Mrs. Porter;
13. Following the ceremony, the parties hosted a reception at the church for those in attendance;
14. At the reception, the parties were introduced as husband and wife;
15. At the reception, they participated in the traditional first dance as husband and wife;
16. At the reception, the best man gave a toast to the couple;
17. Following the reception, the parties stayed at a hotel in Washington, D.C. The hotel stay was a gift from Mr. Porter's 's [sic] sisters;
18. As a result of both parties being too tired (and Ms. Porter being approximately five months pregnant), the parties elected not to engage in sexual intercourse on the night of the ceremony or the morning thereafter, while in D.C.;
19. From the day immediately following the ceremony until May 2006, the parties did not live in the same residence;

20. Since approximately May 2006, the parties have lived together in the same residence;
21. Since approximately May 2006, the parties have lived together in Virginia;
22. Since February 25, 2006, through the parties' separation in September 2015, they both considered themselves to be married, and regularly held themselves out to friends, family, and the community as such;
23. Since February 25, 2006, the parties' [sic] have filed joint tax returns on which they've listed themselves as married;
24. Since February 25, 2006, the parties' [sic] have purchased a home on which they are titled as tenants by the entirety. Said home is located in Virginia;
25. Ms. Porter's daughter, [redacted] believed the parties to be married, but is aware of the current controversy;
26. The parties' son [] believes the parties to be married; [1]

Pl.'s Ex. 1, 1-3 (July 27, 2017).

The parties obtained their license from Fairfax County on February 24, 2006. Def.'s Opening Br. Regarding Decl. of Marriage Status at 2 (hereinafter Def.'s Open. Br.). The Marriage Register was filed with Fairfax County Circuit Court on March 08, 2006. Def.'s Br. Ex. A.

I. Is a marriage void if the parties obtained a valid Virginia marriage license and subsequently held a marriage ceremony conducted by a Virginia-licensed marriage celebrant, but the ceremony took place outside the geographic confines of the Commonwealth?

This is a matter of first impression in Virginia. While Virginia courts have looked at whether a license must be obtained before or after solemnization, see MacDougall v. Richard S. Levick, 66 Va. App. 50 (2016), Virginia courts have not yet decided the issue as to whether a marriage can be considered valid where the solemnization takes place outside the Commonwealth. Virginia's Attorney General has, however, dealt with an issue virtually identical to the matter now before the Court.[2]

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[1] There was one child born of the marriage on [redacted]. Def.'s Open. Br. at 2. Regardless of whether or not the parties are deemed married, any children from the relationship are deemed legitimate pursuant to Virginia Code § 20-31.1, which states in relevant part: "The issue of marriages prohibited by law, deemed null or void or dissolved by a court shall nevertheless be legitimate." Va. Code Ann. § 20-31.1

[2] Virginia Attorney General, James Lindsay Almond Jr., in a letter to Senator Curry Carter dated January 24, 1952, stated:

> I have given some thought to the matter which you discussed with me yesterday relative to Senate Bill No. 59, introduced by you on January 16, 1952. The facts submitted by you are essentially as follows:
>
> A marriage license was duly issued by the clerk of the Circuit Court of Augusta County authorizing the marriage of H and W, both residents of

A. Relevant Virginia Statutes

Certain sections in Title 20 describe the requirements for a valid marriage to be created under Virginia law.

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said county. The marriage ceremony was performed by a minister resident and qualified to perform rights of marriage *in Virginia*. You desire my opinion as to the validity of this marriage.

The statutes of both Virginia and West Virginia prescribe certain indispensable requirements for a celebration of a valid marriage within the State. The States require that the marriage license be procured, that certain serological tests be made, and that the marriage be solemnized in the manner required by the statutes. In Virginia it may be solemnized by either a minister who has qualified to perform such rites before the proper court, or some other person may be authorized by law. In West Virginia the marriage must be solemnized by a minister authorized by the circuit or county court to perform marriages. The marriage in question was solemnized in West Virginia under a Virginia license. Virginia cannot authorize the entering into a marital state beyond the confines of the State.

You are familiar with the general rule that a marriage valid where performed is valid everywhere, with certain exceptions not here material. The marriage performed in this instance was not valid where celebrated; therefore, no legal vitality can be imputed to it.

Section 20-23 of the Code relating to the authorizing of ministers to perform the marriage ceremony restricts the authority of the minister to celebrate the rites of matrimony in this State. If the statute did not contain such language, Virginia could not authorize a minister to perform the rites of marriage in any other State without reciprocal legislation between the two States.

My conclusion is, therefore, that these people are not married. The simple way out would be for them to secure a license and have the ceremony performed as directed by law. Our Supreme Court has held that the Virginia statutes requiring the issuance of a license and the solemnization of marriages is mandatory.

I believe this is in reply to the question which you submitted.

1951-1952 Op. Va. Att'y Gen. 101, 101.

OPINION LETTER

i. Virginia Code § 20-13

In pertinent part, Virginia Code § 20-13 states that:

> Every marriage *in this Commonwealth* shall be under a license and solemnized in the manner herein provided.

Va. Code Ann. § 20-13 (emphasis added). The license and solemnization requirements are mandatory. See, e.g., Offield v. Davis, 100 Va. 250 (1902) and Eldred v. Eldred, 97 Va. 606 (1899) (finding the statute is mandatory, not merely directory). The phrase "in this Commonwealth" supports the conclusion that the solemnization requirement must occur within the geographic confines of the Commonwealth.

ii. Virginia Code § 20-23

In pertinent part, Virginia Code § 20-23 states as follows:

> When a minister of any religious denomination produces before the circuit court of any county or city in the Commonwealth, or before the judge of such court or before the clerk of such court at any time, proof of his ordination and of his being in regular communion with the religious society of which he is a reputed member, or proof that he is commissioned to pastoral ministry or holds a local minister's license and is serving as a regularly appointed pastor in his denomination, such court, or the judge thereof, or the clerk of such court at any time, may make an order authorizing such minister to celebrate the rites of matrimony *in the Commonwealth*. Any order made under this section may be rescinded at any time by the court or by the judge thereof. No oath shall be required of a minister authorized to celebrate the rites of matrimony, nor shall such minister be considered an officer of the Commonwealth by virtue of such authorization.

Va. Code Ann. § 20-23 (emphasis added).

The critical phrase, for purposes of the issue now before the Court, is "in the Commonwealth." It is not surplusage. Rather, it emphasizes the geographical limitations of the statute. In other words, a Virginia Circuit Court may only authorize a minister to celebrate the rites of matrimony in the Commonwealth.

iii. Virginia Code § 20-31

Virginia Code § 20-31, sometimes referred to as the "curative statute," does not apply to

marriages in the Commonwealth which would be considered void *ab initio*. See In re Ejigu, 79 Va. Cir. 349, 350 (2009). The text of Virginia Code § 20-31 reads as follows:

> No marriage solemnized under a license issued in this Commonwealth by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, or any defect, omission or imperfection in such license, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

Va. Code Ann. § 20-31.

Thus, Virginia Code § 20-23 addresses two problems: (1) a "want of authority" in the marriage celebrant; and (2) a "defect, omission or imperfection" in the marriage license. Under either circumstance, the marriage must be "in all other respects lawful." In the instant case, there was neither a "want of authority" in the marriage celebrant or a "defect, omission or imperfection" in the license itself. The fact that the marriage license incorrectly stated that the marriage ceremony was conducted in Arlington, Virginia, when it was actually conducted in the District of Columbia, is not a "defect, omission or imperfection," but, rather, a false statement. Moreover, the statute requires that the marriage "be in all other respects lawful." Given that Virginia Code § 20-13 requires both a license and a solemnization, and given the Court's conclusion that the solemnization must have taken place in the Commonwealth, this is not a marriage that "in all other respects [was] lawful."

iv. Virginia Code § 20-37.1

Virginia Code § 20-37.1, enacted in 1952, does have language relevant to the instant situation, but would not apply to the facts now before the Court. The statute reads as follows:

> All marriages *heretofore* solemnized outside this Commonwealth by a minister authorized to celebrate the rights of marriage in this Commonwealth, and showing on the application therefor the place out of this Commonwealth where said marriage is to be performed, shall be valid as if such marriage had been performed in this Commonwealth.

Va. Code Ann. § 20-37.1 (emphasis added).

It is a well-accepted fact that when interpreting a statute, courts are to look at the meaning of the statute on its face.[3] The word "heretofore" in the statute is the most significant term to

[3] See, e.g., Jones v. Conwell, 227 Va. 176, 181 (1984) (stating that "[t]he rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a

evaluate. Although Title 20 of the Virginia Code does not define the word "heretofore," the Court may look to the generally-recognized definition of the word to determine the meaning. Black's Law Dictionary defines "heretofore" as "[u]p to now; before this time." *Heretofore,* Black's Law Dictionary, (9th ed. 2009). Webster's Dictionary defines "heretofore" as "up to this time: hitherto." Webster's Ninth New Collegiate Dictionary, 566 (Frederick C. Mish ed., 9th ed. 1990). Based on these definitions, the Court understands "heretofore" in this instance to apply only to marriages that occurred before the statute was created. To read the statute in any other way would require omitting the term "heretofore" entirely.

In 2010, Attorney General Kenneth T. Cuccinelli, II issued an official advisory opinion with regard to this precise issue. The issue presented to Attorney General Cuccinelli was as follows:

> You ask if a valid marriage exists where: (a) the bride and groom are issued a marriage license by a clerk of a Virginia court; (b) the ceremony is performed by a minister or other person authorized in Virginia to celebrate the rights of marriage; and (c) the solemnization of the marriage occurs in a state other than Virginia.

2010 Op. Va. Att'y Gen. 10-025 (May 18, 2010). Attorney General Cuccinelli opined that the circumstance presented did not create a valid marriage. In particular, Attorney General Cuccinelli addressed the issue as to whether Virginia Code § 20-37.1 would legitimize the marriage. Like this Court, Attorney General Cuccinelli focused on the implications of the word "heretofore":

> The term "heretofore" "'in its common acceptation, means before: before and up to the present time; before, or down to, this time; hitherto; in time past, previous time, or previously; up to this time; and it may mean in times before the present; formerly.'" Therefore, it is my opinion that § 20-37.1 is limited in its application to marriages performed before this statute went into effect. To read the statute otherwise would render the term "heretofore" superfluous. "Words in a statute should be interpreted, if possible, to avoid rendering words superfluous."

2010 Op. Va. Att'y Gen. 10-025 (May 18, 2010) (footnotes omitted). The Court agrees with

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portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed."); McClung v County of Henrico, 200 Va. 870, 874 (1959) (holding that "[i]t is a settled rule of construction in this state that where a statute is plain and unambiguous there is no room for construction by the court and the plain meaning and intent of the statute will be given it." (citing Temple v Petersburg, 182 Va. 418, 422, 423; Great A. & P. Tea Co. v. Richmond, 183 Va. 931, 948; South Hill v. Allen, 177 Va. 154, 164; 17 Mich. Jur., Statutes, § 34)). Thus, when interpreting this statute the Court must first decide if the statute's meaning is plain on its face.

Attorney General Cuccinelli's analysis. Virginia Code § 20-37 only applies to marriages entered into prior to the passage of the statute in 1952.

Finally, the 1952 statute constitutes a legislative recognition that legislation was required to validate pre-1952 marriages performed outside the Commonwealth. No similar legislation addresses post-1952 marriages.

B. Conclusion

The parties' "marriage" is not valid as a marriage created under Virginia law. Virginia case law and statutes clearly dictate that in order to form a valid marriage in Virginia, the parties must have two elements: a Virginia license and a Virginia ceremony. Here, the parties had the former, but lacked the latter. Thus, the marriage is void *ab initio*.

II. Do the facts support a finding that the parties entered into a common law marriage in the foreign jurisdiction?

Common law marriages are not defined in any statute in the District of Columbia as they are, by definition, created by the common law. See McCoy v. District of Columbia, 256 A.2s 908, 910 (D.C. Ct. of App. 1969). Although Virginia has chosen not to accept the creation of common law marriages in the Commonwealth, Virginia does recognize common law marriages created in other states if the marriage would be considered lawful in the other state. "Although Virginia does not recognize domestic common-law marriages, it does extend comity to such unions 'valid under the laws of the jurisdiction where the common-law relationship was created.'" Kelderhaus v. Kelderhaus, 21 Va. App. 721, 725-26 (citations omitted).[4]

"The District of Columbia has long recognized common law marriages." Coates v. Watts, 622 A.2d 27, 27 (D.C. Ct. of App. 1993) (citing Hoage v. Murch Bros. Construction Co., 60 App. D.C. 218 (1931)); see also McCoy v. District of Columbia, 256 A.2s 908 (D.C. Ct. of App. 1969). The necessary elements for creation of a common law marriage in the District of Columbia are: "cohabitation as husband and wife, following an express mutual agreement, which must be in words of the present tense." Coates at 27. (citing East v. East, 536 A.2d 1103, 1105 (D.C. 1988)).[5]

[4] See also Reynolds v. Reynolds, 60 Va. Cir. 414, 416 (2002) (stating "Virginia does recognize a common law marriage that is valid under the laws of the jurisdiction in which it was created." (citing Farah v. Farah, 16 Va. App. 329, 334 (1993) (citing Kleinfield v Veruki, 7 Va. App. 183, 186 (1988)))).

[5] In East v. East, the District of Columbia Court of Appeals held that "[t]o prove such a [common law marriage] relationship, the evidence must show 'that the parties cohabitated as husband and wife in good faith, that is, that the cohabitation followed an express mutual agreement to be husband and wife.'" East v. East, 536 A.2d 1103, 1105 (D.C. 1988) (quoting United States Fidelity & Guaranty Co v. Britton, 269 F.2d 249, 252 (D.C. Cir. 1959)).

In other words, there are two requirements to establish a common law marriage in the District of Columbia: (1) an express mutual agreement; and (2) cohabitation. [6]

Significantly, the cohabitation must occur in the District of Columbia. See Todd v. Todd, 171 F.2d 143, 143 (D.C. Ct. of App. 1948) ("...there was no valid evidence showing cohabitation in the District of Columbia, an essential in the proof of common law marriage in this jurisdiction."). Virginia case law is in agreement with the principle that the conduct establishing a common law marriage must occur in the common law state itself. See Kelderhaus, 21 Va. App. at 726-28. In other words, the fact that the parties in the instant case lived for years as husband and wife in Virginia subsequent to the District of Columbia marriage ceremony cannot be the evidentiary basis for finding that they entered into a common law marriage in the District of Columbia.

The parties are in agreement that they held a ceremony in the District of Columbia on February 25, 2006. At this ceremony, the parties pledged themselves to one another as husband and wife in front of their friends and family. In Hoage v. Murch Bros. Construction Co., one of the first District of Columbia cases referencing the validity of common law marriages, the Court held that the "agreement" between parties must be proven "per verba de praesenti."[7] Hoage v. Murch Bro Construction Co., 60 App. D.C. 218 (1931). The parties in the current case clearly indicated an agreement to marry one another using words in the present tense during the District of Columbia ceremony. Thus, the requirement of an express mutual agreement is established. It is the second argument—cohabitation—that is at issue.

Although cohabitation is a required element of common law marriage in the District of Columbia, the minimum length of that cohabitation has never been clearly defined in District of Columbia case law. Other common law marriage states have defined cohabitation, but there is no one uniform, nationwide, commonly-accepted definition of the term. For example, one Iowa court described cohabitation as: "often includ[ing] the concept of intimacy or sexual relations.... Cohabitation is generally defined as 'the fact or state of living together, esp. as partners in life usually with the suggestion of sexual relations.'" In re Marriage of Derryberry, 2014 Iowa App. LEXIS 632, *10-11 (2014) (citations omitted). An Ohio court stated that: "[t]his court has never defined 'cohabitation,' and the courts of appeals throughout Ohio have adopted various definitions." State v. Williams, 79 Ohio St. 3d 459, 462 (1997). A Texas court held cohabitation necessitates "living together, claiming to be married, in the relationship of husband and wife, and doing things ordinarily done by husband and wife." Claveria v Estate of Otha Faye McQuid Claveria, 1979 Tex. App. LEXIS 4118, *8 (1979) (citation omitted). One Kansas court used the definition of "'[living] together as husband and wife [and] mutual assumption of those marital

[6] The burden of proof in a case of this nature is preponderance of the evidence. See East v. East, 536 A.2d 1103, 1106 (1988) (stating "we hold that a party alleging a common-law marriage need prove it only by a preponderance of the evidence. We are aware that some jurisdictions require a common-law marriage to be proven by clear and convincing evidence, [] but we decline to make the District of Columbia one of those jurisdictions." (citation omitted)).

[7] The Latin phrase "per verba de praesenti" means "[b]y words in the present tense." *Per Verba de Praesenti,* Black's Law Dictionary, (9th ed. 2009).

rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.'... 'The circumstances of the relationship, as well as the realities of modern married life, may be considered by the trial court in determining whether the evidence establishes cohabitation.'" In re Marriage of Knoll, 52 Kan. App. 2d 930, 935 (2016) (citations omitted).

The question before this Court is whether a one-night hotel stay after a marriage ceremony is sufficient to establish cohabitation in the District of Columbia. This Court concludes that a one-night hotel stay – even where the parties believe themselves to be married and have been through a marriage ceremony – is insufficient.

While there is some case law supporting the proposition that a brief stay in a common law state is sufficient to establish a common law marriage, see, e.g., Blaw-Knox Construction Equipment Co. v. Morris, 88 Md. App. 655 (1991), the weight of authority is that more is required. See, e.g., 52 Am. Jur. 2d Marriage § 73 (2002) ("[a] brief sojourn, whether for business or social purposes, by a nondomiciliary couple in a state which provides for the creation of a common law marriage is insufficient to consummate such a marriage."); see also Cross v. Cross, 146 A.D.2d 302, 310 (1989) ("[P]laintiff cannot establish cohabitation and reputation in Washington, D.C., on the basis of a two-day visit.").

In this respect the Virginia Court of Appeals opinion in Kelderhaus is instructive. The facts in Kelderhaus are as follows:

> Bruce and Lena Kelderhaus obtained a marriage license in California on December 21, 1992. When applying for the license, husband knowingly misrepresented that his marriage to another had been previously dissolved. Several days later, the parties ostensibly married in California, then traveled to Flagstaff, Arizona, residing together there as husband and wife. On July 26, 1993, an Arizona decree divorced husband from his former wife and, on August 1, 1993, husband and wife participated in a second marriage "ceremony." The parties thereafter continued to reside together and represented themselves as husband and wife in Arizona until early August, 1993, when they relocated to Virginia. In driving from Arizona to Virginia, the parties "traversed the country" as "husband and wife," stopping "overnight" in Texas and Oklahoma.

Kelderhaus, 21 Va. App. at 724-25. The Court of Appeals held that no common law marriage was created in either Texas or Oklahoma based on the parties' overnight stops in those jurisdictions. The stop in Texas was described as only establishing "brief, transitory contact with the state" which was insufficient to create a common law marriage. Id. at 726. Similarly, the stop in Oklahoma was described as constituting only "minimal contact." Id. at 727. Finally, the Court held that "[t]o sanction marriage arising from such an insignificant nexus with the common law state would at once distort and trivialize the concept of common law marriage and ignore the principles which govern such unions in Oklahoma." Id. at 728.

The instant case presents almost an identical situation—a one-night stay at a hotel in a foreign jurisdiction—and leads this Court to the identical conclusion: no common law marriage was created.

The defendant is to prepare an order in accordance with this opinion and, after providing it to the plaintiff to note his objection, submit it to the Court for entry within fourteen (14) calendar days.

Sincerely,

[redacted]

Randy I. Bellows
Circuit Court Judge

OPINION LETTER